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CONSTITUTIONAL LAW—A STRUGGLE BETWEEN THE PRESUMPTION OF CORRECTNESS AFFORDED STATUTORY PRECEDENTS AND DEFERENCE TO FEDERAL AGENCIES

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NOTES AND COMMENTS

CONSTITUTIONAL LAW—A STRUGGLE BETWEEN THE PRESUMPTION OF CORRECTNESS AFFORDED STATUTORY PRECEDENTS AND DEFERENCE TO FEDERAL AGENCIES

INTRODUCTION

Stare decisis literally means "[t]o abide by, or adhere to, decided cases."[1] There is no federal statute which requires stare decisis,[2] nor is it a rule of law. Rather, stare decisis is a matter of public policy,[3] the importance of which is undisputed in Anglo-American jurisprudence.[4]

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1. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990); *see* Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6 (1941) ("The decision of the ultimate court of review in a common-law jurisdiction is held to bind all inferior courts of that jurisdiction . . . ."); Note, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 413 (1924).

2. The United States Code allows the Supreme Court to review lower court decisions two ways:

> (1) By writ of certiorari granted upon the petition of any party . . .; [or]
>
> (2) By certification at any time by a court of appeals of any question of law . . . as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1254 (1988); *see also* 28 U.S.C. § 1291 (1988). This implies that only the Supreme Court may reverse lower court decisions or remand the case with instructions. *See generally* Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514, 525 (1943) ("A decision of the United States Supreme Court is binding on federal matters on all other courts, federal or state."); Note, *Stare Decisis and the Lower Courts: Two Recent Cases*, 59 COLUM. L. REV. 504, 507 (1959).

3. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."), *overruled in part on other grounds*, Helvering v. Bankline Oil Co., 303 U.S. 362, 369-70 (1938) *and* Helvering v. Mountain Producers Corp., 303 U.S. 376, 387 (1938); Geohegan v. Union Elevated R.R., 266 Ill. 482, 496, 107 N.E. 786, 793 (1915).

4. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969 (3d Cir. 1979) ("The essence of the common law doctrine of precedent or *stare decisis* is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length."); *see* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (Several factors underlying stare decisis include respect for the judicial system, certainty in the application of laws, and fairness and expeditiousness in the administration of justice.); Helvering v. Griffiths, 318 U.S. 371, 389-402 (1943) (more important to follow precedent, even though it be unsatisfactory, in order to

One narrow aspect of stare decisis focuses on statutory precedent.[5] Compared to common law precedents and constitutional precedents,[6] statutory precedents are given a strong presumption of correctness.[7] This presumption may be rebutted, however, "by

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avoid the unfortunate practical results of changing the rule); H. JONES, J. KERNOCHAN & A. MURPHY, LEGAL METHOD 5 (1980) (explaining the role of stare decisis in common law systems); Comment, *Judicial Precedents.—A Short Study in Comparative Jurisprudence.*, 9 HARV. L. REV. 27, 35-36 (1895) ("[I]t is law in England and in the United States that, apart from its intrinsic merits, the decision of a court . . . is absolutely binding on all inferior courts."). *But see* Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1361 (1988) ("Stare decisis . . . has been considered by American courts to be more a rule of thumb than an ironfisted command."); Moore & Oglebay, *supra* note 2, at 539 (An American court does not feel itself "inexorably bound by its own precedents.").

5. *See generally* Eskridge, *supra* note 4, at 1363.

6. Edelman v. Jordan, 415 U.S. 651, 671 (1974) ("Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law."); *see* Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 152-55 (1958) (Supreme Court overruled past precedent at least 90 times between 1810 and 1957, 60 of which involved constitutional precedents); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 743 (1949) (Supreme Court overruled constitutional precedents 21 times between 1937 and 1949); Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENTARY 123, 127 (1985) (Stare decisis is not applied rigidly in constitutional cases because "constitutional law is thought to be a living instrument of public policy adaptable to changing circumstances."); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467 (Supreme Court overruled constitutional precedents at least 47 times between 1959 and 1979); *see also* Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VAL. U.L. REV. 101, 112-26 (1969) (A survey of precedents overruled by the Warren Court and accompanying rationales for their decisions).

7. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation . . . ."); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (The six decades that have passed "are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute."); *see, e.g.*, NLRB v. International Longshoremen's Ass'n, 473 U.S. 61, 84 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

Several writers have commented on the distinction between the presumption of correctness afforded statutory precedent as compared to constitutional precedent. For example, one commentator noted:

> The doctrine of finality for prior decisions setting the course for the interpretation of a statute is not always followed. . . . Nevertheless, the doctrine remains as more than descriptive. More than any other doctrine in the field of precedent, it has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other.

Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948), *quoted in* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 n.34 (1986); Marshall, *"Let Congress Do It": The Case For An Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989) (advocating an absolute rule that only Congress has the

changed circumstances which render the statutory precedent not only inconsistent with original legislative expectations and evolving statutory policy, but indeed counterproductive to current policy."[8]

When courts are faced with an issue of statutory interpretation, they look to precedent for guidance; they also look to the agency charged with administering the statute. An agency will often have taken a position on a particular issue through the issuance of an interpretative rule.[9] When judicial precedent and an interpretative rule dif-

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power to overrule the Court's interpretation of federal statutes); *see* R. KEETON, VENTURING TO DO JUSTICE 79 (1969) ("Can and should the court overrule its earlier [statutory] interpretational decision, subject only to the same limitations it would apply in overruling one of its common law decisions? Not so, say many courts and writers."); Eskridge, *supra* note 4, at 1363 (suggesting the super-strong presumption should be abandoned and replaced with an "evolutive" approach which the Court has suggested in constitutional cases); Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247 (1947) (supporting super-strong presumption given statutory precedents); Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611, 626 (1977) (Stare decisis should be adhered to more strictly in statutory cases than in common law or constitutional cases.); *see also* Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 388-89 (1988) (criticizing the Court's reasons in distinguishing between statutory, common law, and constitutional precedents); Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345, 370-71 (1986) (supporting presumption of validity in statutory precedent, but disagreeing with the presumption in constitutional cases). *But see* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 252-55 (1975) (criticizing super-strong presumption afforded statutory precedents).

8. Eskridge, *supra* note 4, at 1364. The precedent should not be overruled unless the original reasons for the rule have disappeared or have been weakened, the rule has been persuasively criticized, and practical experience shows the original goals are being undermined by the existing rule. *Id.* The precedent should not be overruled, however, if there has been "substantial legislation or private reliance on the rule." *Id.*; *see* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472-79 (1987) (Court overruled Parden v. Terminal Ry., 377 U.S. 184 (1964), but refused to overrule Hans v. Louisiana, 134 U.S. 1 (1890), *Ex parte* New York, No. 1, 256 U.S. 490 (1921), and cases relying on them. *Hans* and the line of cases that followed will not be overruled in the absence of "special justification" for such a departure from the doctrine of stare decisis.); Puerto Rico v. Branstad, 483 U.S. 219, 224-30 (1987) (The Court overruled *Ex parte* Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861). Due to the passage of time, the fundamental holding of *Dennison* was not representative of the current law because it was decided during the Civil War when state secession was threatening and the federal government's power was at its lowest point.).

9. Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:11, at 55 (2d ed. 1979) ("When Congress enacts a statute and assigns the administration of it to an agency, the agency encounters questions the statute does not answer and the agency must answer them. The agency heads must instruct their staffs what to do about such questions . . . ."); Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101, 118 (1971) ("An active agency with a broad mandate . . . may formally or informally take positions on literally hundreds of questions with regard to the proper construction of the statutes or

fer, courts are in a peculiar situation that calls for a delicate balancing of policies.

Although courts may be bound, to an extent, by precedent, and almost absolutely bound by a legislative rule,[10] an interpretative rule is not binding on the courts.[11] Even though not binding, courts may give an interpretative rule authoritative effect.[12]

Courts sometimes give authoritative effect to an interpretative rule when they agree with the agency.[13] Similarly, courts will defer to the agency when the courts lack sufficient expertise and are satisfied with the agency's rule.[14] Likewise, courts may defer to the agency

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regulations it administers each month."); Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769, 770 (1988) ("The rules an agency issues in its efforts to inform its staff and the public in the course of its statutory construction are known as interpretative rules.").

10. Legislative rules have been described as "the product of an exercise of delegated legislative power to make law through rules." 2 K. DAVIS, *supra* note 9, § 7:8, at 36. Legislative rules are set aside only if "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . . " 5 U.S.C. § 706(2) (1988).

11. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); 2 K. DAVIS, *supra* note 9, § 7:13, at 59.

The Administrative Procedure Act suggested that interpretative rules were to have little effect on a court's statutory construction. It originally stated, "[s]o far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action." Administrative Procedure Act, ch. 324, § 10(e), 60 Stat. 237, 243 (1946). The law currently states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1988).

The Senate Committee on the Judiciary further explained that the "subsection provides that questions of law are for courts rather than agencies to decide in the last analysis." S. REP. NO. 752, 79th Cong., 1st Sess. 28 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 185, 214 (1946). The report of the House Committee on the Judiciary gives the same explanation. *See* H.R. REP. NO. 1980, 79th Cong., 2d Sess. 6 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 233, 278 (1946). The Senate Committee also explained that " 'interpretative' rules—as merely interpretations of statutory provisions—are subject to *plenary judicial review*, whereas 'substantive' rules involve a maximum of administrative discretion." SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS. (Comm. Print 1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 11, 18 (1946) (emphasis added).

12. 2 K. DAVIS, *supra* note 9, § 7:13, at 59.

13. *Id.*

14. *Id.*; *see* Rosado v. Wyman, 397 U.S. 397, 415 (1970) ("While . . . HEW's construction commands less than the usual deference that may be accorded an administrative

depending upon the date of the creation of the interpretative rule. If the rule has been longstanding, courts may be less reluctant to adopt it.[15]

If the courts do not give the agency interpretation authoritative effect, the courts may give the interpretation varying degrees of deference, ranging from "the greatest deference"[16] to virtually no deference.[17] Reviewing courts are also free to substitute their own judgment for the content of the interpretative rule.[18]

Because there is no administrative rule of stare decisis,[19] an agency is free to change its interpretative rule even after the Supreme Court has ruled on a particular interpretation of the rule. When the two rules differ, lower courts must then determine whether to follow

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interpretation based on its expertise, it is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers."); Center for Auto Safety v. Ruckelshaus, 747 F.2d 1, 5 (D.C. Cir. 1984) ("A high degree [of deference] is appropriate . . . when the agency's expertise can help in assessing the effects of competing interpretations upon the policies of the statute . . . ."); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 170 (D.C. Cir. 1982) ("[D]eference is not a unitary concept, to be applied with equal force to all issues in a case. If some issues involve scientific expertise and others do not, the agency will receive greater deference on the issues that do.").

15. *See infra* note 188.

16. *See* Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 56, 57-58 (1981) ("[U]nless the . . . Act requires a contrary conclusion, the Board's interpretation of the plain language of the . . . Act must be upheld."); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 83 (1980) ("It is by now a commonplace [sic] that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' " (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965))); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166-67 (D.C. Cir. 1982) (great deference is the "general rule").

17. 2 K. DAVIS, *supra* note 9, § 7:13, at 60.

18. 5 K. DAVIS, *supra* note 9, § 29:1, at 332.

19. NLRB v. Local Union No. 103, 434 U.S. 335, 351 (1978) ("An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."); Bankamerica Corp. v. United States, 462 U.S. 122, 149 (1983) (White, J., dissenting) ("There is, of course, no rule of administrative *stare decisis*. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view." Courts have approved such interpretative changes so long as the new interpretation is consistent with congressional intent.). One commentator noted:

> [T]he adjudicative officials of administrative agencies share and respond to the feelings and aspirations that are reflected in the principle of *stare decisis*: the urge for intellectual consistency in decision-making and the wish to demonstrate that equality of treatment is being given to all claimants and respondents. . . . But it would be grossly misleading to suggest that the common law doctrine of precedent is, as in the courts, the pervasive and governing norm of administrative adjudication.

H. JONES, J. KERNOCHAN, & A. MURPHY, *supra* note 4, at 11-12.

the older rule endorsed by the Supreme Court or defer to the agency and its new interpretative rule.[20] In making their determinations, the lower courts must keep in mind the doctrine of stare decisis and the strong presumption of correctness given judicial interpretations of statutory language.

Recently, in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*,[21] the Court of Appeals for the Ninth Circuit confronted such a situation. The Ninth Circuit was faced with an interpretative rule adopted by the National Labor Relations Board ("NLRB") which stated that prehire agreements[22] could not be unilaterally repudiated.[23] By contrast, two earlier Supreme Court decisions held that these agreements could be unilaterally repudiated.[24] In the earlier Supreme Court cases, the Court and the NLRB agreed on the particular statutory interpretation.[25] Later, the NLRB announced it had changed its position on the statutory interpretation; its new interpretative rule now contradicted the rule previously upheld by the Supreme Court.[26]

When confronted with these two contrasting rules, the Ninth Circuit opted to defer to the agency, thus implementing the agency's new interpretative rule.[27] The result was a rule of law in stark contrast to the one previously adopted by the Supreme Court. The Ninth Circuit rationalized its decision by construing the earlier Supreme Court precedents as simple deference to the NLRB.[28] In doing so, the Ninth Circuit ignored the strong presumption of correctness given such judicial interpretations.

This Note explores the environment which gave rise to *Mesa Verde*. Section I discusses statutory stare decisis and provides a brief background of the NLRB and its relationship with the courts. Section

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20. *See* H.R. REP. NO. 432, 98th Cong., 1st Sess. 428-29 (1983) ("The application of Supreme Court decisions to executive branch policies is virtually undisputed: if a particular policy is found unconstitutional, or contrary to the statute, that decision is binding on the agency. The appropriate application of circuit and district court decisions to agency policies is not as clear-cut.").

21. 861 F.2d 1124 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990).

22. *See infra* note 73.

23. *See infra* notes 80-81.

24. Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983); NLRB v. Local Union No. 103, 434 U.S. 335 (1978) (commonly referred to as "*Higdon*"); *see infra* notes 80-81.

25. *McNeff*, 461 U.S. at 266-71; *Higdon*, 434 U.S. at 351-52.

26. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770, 771 (3d Cir.), *cert. denied*, 488 U.S. 889-90 (1988).

27. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1136 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990).

28. *Id.* at 1129-31.

II sets out the facts of *Mesa Verde* and the court's reasoning. Section III suggests that the Supreme Court's interpretation became a part of the statute, due to statutory stare decisis, and as such it enjoyed a strong presumption of correctness. Section III then presents the traditional exceptions to statutory stare decisis to determine whether *Mesa Verde* is a justifiable departure. Finally, Section III rationalizes the decision under deference to agencies to determine whether the court's deference was appropriate.

I. BACKGROUND

A. *Statutory Stare Decisis*[29]

The origins of the "doctrine" of statutory stare decisis are something of a mystery.[30] Several different rationales have been advanced for the strong presumption granted statutory precedents. The Supreme Court once said that a longstanding statutory interpretation becomes "part of the warp and woof of the legislation,"[31] which only Congress can change.[32] The statute then becomes amended to the ex-

29. For early examples of unusual stare decisis protection granted statutory precedents, see Eskridge, *supra* note 4, at 1366 n.24.

30. Eskridge, *supra* note 4, at 1364 ("[T]he super-strong presumption against overruling statutory precedents is a very odd doctrine, if it can even be called that."). Not until *Burnet v. Coronado Oil & Gas Co.* did the Court recognize a relaxed standard of stare decisis for constitutional cases. *See* 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting), *overruled in part on other grounds*, Helvering v. Bankline Oil Co., 303 U.S. 362 (1938) *and* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938). In his dissenting opinion, Justice Louis Brandeis stated that "in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Burnet*, 285 U.S. at 406-07 (citation and footnote omitted). Although there was no distinction mentioned between common law and statutory precedents, Justice Brandeis elaborated on this point in a later opinion. In the later opinion, Justice Brandeis was fully persuaded of the precedent's error, but stated: "[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." Erie R.R. v. Tompkins, 304 U.S. 64, 77-78 (1938) (footnote omitted) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).

31. Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948); *cf.* Douglass v. County of Pike, 101 U.S. 677, 687 (1879) ("After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.").

32. *See* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) ("We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling . . . , it must come from Congress, rather than from this Court."); *Francis*, 333 U.S. at 450.

tent of the court's decision.[33]

Another reason for supporting the strong presumption of statutory precedent is founded upon legislative acquiescence.[34] Congress is presumed to be fully cognizant of the interpretation of the statutory scheme.[35] If Congress does not overrule the precedent, and especially if it reenacts the statute without changing the language at issue, courts presume Congress approved of the judicial interpretation.[36] Any subsequent change of this judicial decision should then come from the legislature.[37]

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33. Horack, *supra* note 7, at 250.

34. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 629 n.7 (1987); *see* NLRB v. International Longshoremen's Ass'n, 473 U.S. 61, 84 (1985) (Congress had not altered the interpretation since it was handed down eighteen years beforehand, nor was any evidence offered regarding Congress' original intent. Meanwhile, both labor and management had relied on the decision. "In such circumstances we should follow the normal presumption of *stare decisis* in cases of statutory interpretation."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-37 (1977); Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 91 (1988).

35. *Square D Co.*, 476 U.S. at 419; City of Oklahoma City v. Tuttle, 471 U.S. 808, 837 (1985) (Stevens, J., dissenting); Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); *see also* Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 459 U.S. 297 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Albernaz v. United States, 450 U.S. 333 (1981). *But see* Marshall, *supra* note 7, at 182-96 (criticizing theory of congressional acquiescence); Rogers, *supra* note 7, at 612 (Because legislatures are extremely busy, "[t]he issue presented by a court reversal of a prior statutory construction may be considered trivial or of little importance compared to the other questions confronting a legislature.").

36. *Square D Co.*, 476 U.S. at 419 (Congress specifically addressed this area and left the case at issue undisturbed; this lends "powerful support" to the case's continued viability.); Lorillard, Inc. v. Pons, 434 U.S. 575, 580-81 (1978) (reenactment is treated as ratification of court's earlier decision); Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."); Girouard v. United States, 328 U.S. 61, 70-76 (1946) (Stone, C.J., dissenting) (failure of Congress to overrule statutory interpretation creates presumption of legislative approval); *see* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam) (legislative acquiescence in precedent); Helvering v. Hallock, 309 U.S. 106, 130-32 (1940) (Roberts, J., dissenting) (legislative approval presumed when Congress reenacted statute with Court's interpretation unchanged). *But see Hallock*, 309 U.S. at 119 ("It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines."); *Girouard*, 328 U.S. at 69 ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); Cleveland v. United States, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring) ("Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments.").

37. Horack, *supra* note 7, at 251-52 (The court's reversal of a previous position of an established rule of law "is explicitly and unquestionably the exercise of a legislative func-

A third reason advanced for the strong presumption of correctness is founded upon the belief that parties have relied upon the decision. Once the Supreme Court interprets a statute, private parties will conduct their affairs accordingly.[38] Presumably, Congress also relies upon the interpretation unless it changes the statute.[39]

The final reason suggested for the presumption hinges upon the separation of powers between Congress and the courts.[40] Under the Constitution, Congress has the task of creating law, while the judiciary is confined to interpreting the law. When the judiciary overrules a statutory precedent which has been "amended" to the statute, it is exercising the congressional power of amending or repealing the law without any of the procedural safeguards associated with the legislature. This judicial exercise of a legislative function is impermissible under the separation of powers doctrine.

Although courts and commentators offer different reasons for the doctrine of the presumption of correctness afforded statutory precedents, there can be no doubt as to its existence. Thus, when a court encounters an issue of statutory interpretation, it should carefully examine the judicial precedent in light of the strong presumption of correctness.

In addition, courts naturally look for guidance to the agency charged with administering the statute. In *Mesa Verde*, the relevant agency was the NLRB. Before considering the case itself, however, perspective can be gained by examining the NLRB's long, and sometimes stormy, relationship with the court system.

B. *Board and Court Relationship*

Congress adopted the National Labor Relations Act ("NLRA" or the "Act"),[41] administered by the National Labor Relations Board,[42] against a backdrop of judicial insensitivity to the principles of

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tion. . . . The judicial change of a legislative rule occurs without any of the safeguards normally surrounding legislative action. The change is not made by elected representatives." It is not done with the usual committee meetings which allow individuals to voice their opinions, nor is there an opportunity for executive veto.).

38. Eskridge, *supra* note 4, at 1382-84.

39. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.").

40. Marshall, *supra* note 7, at 200-08.

41. National Labor Relations (Wagner-Connery) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1988)).

42. Pub. L. No. 74-198, § 6(a), 49 Stat. 449, 452 (codified at 29 U.S.C. § 156 (1988)).

unionism and collective bargaining.[43] Because of this, the Act makes limited provision for judicial review.[44]

Soon after the enactment of the statute, the Supreme Court articulated the Act's purposes and its scope in *National Labor Relations Board v. Hearst Publications, Inc.*[45] The Court stated that the Act was designed to prevent obstructions to the free flow of commerce which result from strikes and other forms of industrial unrest.[46] This was to be achieved by eliminating the causes of that unrest.[47] The Act was premised on findings that strikes and industrial strife result from the refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their working conditions.[48]

The Court, in *Hearst Publications*, stated that the Act uses broad language which "leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications."[49] The Court then explained that the lower courts should defer to the NLRB, in appropriate situations, for the peaceful

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> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

29 U.S.C. § 160(a) (1988).

43. Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399, 401 (1988); *see* Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 INDUS. & LAB. REL. REV. 327, 328 (1958); Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 288 (1960).

44. Originally, the Act stated: "[t]he findings of the Board as to the facts, if supported by evidence, shall be conclusive." National Labor Relations Act of 1935, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454, *amended by* Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 101, 61 Stat. 136, 148 (1947). Currently, the law states: "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e) (1988); *see* Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. CHI. L. REV. 577, 595 (1939).

45. 322 U.S. 111 (1944).

46. *Id.* at 126.

47. *Id.*

48. *Id.* In 1947, Congress reduced the Act's coverage with the passage of the Taft-Hartley Act. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1988)). The preamble of this amendment still refers to "industrial strife" as the principle evil to be avoided by the Act. *Id.* § 1(b), 61 Stat. 136, 136 (codified at 29 U.S.C. § 141(b) (1988)). Even after the Amendment was passed, the limited judicial review remained. *Id.* § 101, 61 Stat. 136, 148 (codified at 29 U.S.C. § 160(e) (1988)).

49. *Hearst Publications*, 322 U.S. at 129.

settlement of employees' disputes with employers. The NLRB deserves this deference because of its familiarity with the circumstances and backgrounds of employment relationships, awareness of the abilities and needs of the workers for self-organization and collective action, and its knowledge of collective bargaining.[50] In particular, the Court explained exactly when it was appropriate to defer to the Board:

> Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination . . . is to be accepted if it has "warrant in the record" and a reasonable basis in law.[51]

In spite of this recommended deference, courts, especially the courts of appeals,[52] have been quick to overrule the Board's decisions.[53] The courts of appeals' rejections of Board decisions have been

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50. *Id.* at 129-30.

51. *Id.* at 130-31 (citations omitted). For similar language, see, e.g., Bayside Enters., Inc. v. NLRB, 429 U.S. 298, 303-04 (1977); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260-67 (1975); NLRB v. Erie Resistor Corp., 373 U.S. 221, 235-37 (1963); NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 94-96 (1957); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47 (1953); NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1172-73 (2d Cir. 1968).

52. For additional discussion of the relationship between agencies and the courts, see generally Dotson & Williamson, *NLRB v. The Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987); Kafker, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137 (1987); Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769 (1988); Zimmerman & Dunn, *Relations Between the NLRB and the Courts of Appeals: A Tale of Acrimony and Accommodation*, 8 EMPLOYEE REL. L.J. 4 (1982); Comment, *"Respectful Disagreement": Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985).

53. One commentator compared the results of two studies on the relationship between the Supreme Court and the NLRB. The studies were conducted twenty years apart and compared in the latter article. In both studies, he concluded: "(1) that the Supreme Court basically approves of the Board's concept of the meaning of the labor statute and (2) that a major portion of the Supreme Court's role in labor policy has been to protect the Board from the circuit courts." Evans, *"Caesar" Revisited: The NLRB and the Supreme Court*, 36 LAB. L.J. 789, 789 (1985). *Contra* Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 72 ("The Supreme Court has in fact shown little deference to Board discretion . . . . And more frequently than not, the

so constant that the Board adopted the following policy of nonacquiescence:[54] "It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise."[55]

The result of the Board's policy of nonacquiescence is a bifurcated system in which litigants can avoid the Board's orders by simply litigating to the appellate level.[56] The effect of the Board's policy is to protract litigation, establish a two-tier system of labor law within the same jurisdiction, encourage disrespect for Board orders, and antagonize the courts.[57] This two-tier system places an undue burden on those litigants who lack the necessary resources to pursue matters to the court of appeals level.[58]

Some courts expressly reject the Board's policy of nonacquiescence: "Congress has not given to the NLRB the power or authority

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Court has employed a broad scope of review that has permitted it to substitute its own judgment.").

54. There are two types of nonacquiescence: intracircuit and intercircuit. Intracircuit nonacquiescence results when an agency fails to defer to precedent within a given circuit. Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 583 (1985). "Intercircuit nonacquiescence is consistent with the prevailing 'law of the circuit' doctrine, under which decisions of a court of appeals are the law of that circuit but do not bind courts in other circuits." Kafker, *supra* note 52, at 138 (quoting Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582, 583 (1985)).

When discussing agency nonacquiescence, one commentator noted:

> [T]he agencies enforce the statutory interpretations of the lower federal courts only with respect to the particular litigants before the courts. . . . Even when presented with the same questions of law, agencies continue to make determinations based upon their own prior administrative policies and statutory interpretations, which the courts have previously rejected.

Note, *Denying the Precedential Effect of Federal Circuit Court Decisions: Nonacquiescence by Administrative Agencies*, 32 WAYNE L. REV. 151, 152 (1985) (footnote omitted)).

The Board premises nonacquiescence on the fact that each court of appeals develops its own "law of the circuit"; decisions of other courts of appeals are persuasive but not binding authority. *See* City Stores Co. v. Lerner Shops, Inc., 410 F.2d 1010, 1014 (D.C. Cir. 1969) ("Decisions of district courts and other courts of appeals are, of course, not binding on us and are looked to only for their persuasive effect. If they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number.").

55. Insurance Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960); *see* Inter-Island Resorts, Ltd., 201 N.L.R.B. 139, 142 n.12 (1973), *enforcement denied*, 507 F.2d 411 (9th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Iowa Beef Packers, Inc., 144 N.L.R.B. 615, 616 (1963), *enforced in part*, 331 F.2d 176 (8th Cir. 1964).

56. Dotson & Williamson, *supra* note 52, at 745.

57. *Id.*

58. *Id.*

to disagree, respectfully or otherwise, with decisions of th[e] court."[59] However, another court stated, "[w]e assume without deciding that the [agency] is free to decline to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits."[60]

The judicial system tolerates the Board's policy of nonacquiescence. Therefore, uniformity of law results only when the Supreme Court rules on the issue.[61] If, however, the Supreme Court rules to support the Board's interpretation, and the Board subsequently changes its interpretation, the lower courts are faced with a conflict. They must then decide whether to follow the decision of the Supreme Court under the doctrine of stare decisis, or whether to defer to the Board as the Supreme Court did.

Precisely this dilemma arose in the Ninth Circuit in the *Mesa Verde* case.[62] The Ninth Circuit was faced with two earlier Supreme Court rulings which upheld a particular NLRB interpretative rule. The problem, however, was that both Supreme Court decisions arguably could be interpreted either as the Supreme Court articulating its own rule (which happened to be in agreement with that of the NLRB) or as the Supreme Court deferring completely to the NLRB. Thus, the Ninth Circuit had to determine whether, as a lower court, it could disagree with the Supreme Court in light of the doctrine of statutory stare decisis.

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59. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) ("[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect."); *see also* Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968) ("[T]he courts are the final authorities on issues of statutory construction, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " (quoting NLRB v. Brown, 380 U.S. 278, 291 (1965) (citation omitted))).

60. S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273, 1278 (5th Cir. 1981). *But see* Ithaca College v. NLRB, 623 F.2d 224, 229-30 (2d Cir.) (reversing NLRB order and declining to remand case to Board, in part because of Board's express refusal to follow Second Circuit precedent), *cert. denied*, 449 U.S. 975 (1980).

61. Insurance Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1959), *aff'd*, 361 U.S. 477 (1960); Bethlehem Steel Co., 89 N.L.R.B. 1476, 1477 (1950) ("With due respect for the opinion of the [c]ourt . . . , the Board is constrained to adhere to the Board's original view until the Supreme Court of the United States has had an opportunity to pass on the question.").

62. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990).

II. *MESA VERDE CONSTRUCTION CO. V. NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS*[63]

In 1980, Mesa Verde, a general contractor, entered into agreements with both the laborers' union and the carpenters' union. These agreements were entered into despite the fact that neither union had obtained majority status. The first agreement with the Laborers was reached on June 26, 1980, and was to remain in effect until June 15, 1983.[64] Thereafter, the agreement would remain in effect from year to year, absent written notice by either party. Under the contract, Mesa Verde agreed to comply with all wages, hours, and working conditions which were set forth in the Laborers' Master Agreement for Northern California.[65] The master agreement between the Laborers, the Associated General Contractors of California, Inc. and Bay Counties General Contractors Association, set wage rates for various jobs and provided for arbitration in certain situations regarding "any dispute concerning the interpretation or application of the agreement."[66] On November 17, 1982, Mesa Verde and the Laborers agreed to extend their contract to June 15, 1986.

Mesa Verde and the Carpenters reached their first agreement in August, 1979.[67] Mesa Verde accepted the Carpenters' Master Agreement for Northern California, an agreement between the Carpenters, the Building Industry Association of Northern California, the California Contractors Council, Inc. and the Millwright Employers Association. The agreement set various rates and provided for arbitration of "[a]ny dispute concerning the relationship of the parties, [and] any application or interpretation of this [a]greement."[68] Later, Mesa Verde and the Carpenters extended the master agreement to June 15, 1986, with certain modifications.[69]

In May, 1984, with members of both unions working on a project in Hercules, California, Mesa Verde notified both unions by mail of its intent to abrogate the agreements.[70] Shortly thereafter, Mesa Verde began another job in Orland, California, employing only non-union

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63. *Id.*

64. *Id.* at 1126.

65. *Id.*

66. *Id.* (quoting the parties' contract).

67. *Id.*

68. *Id.* (quoting the parties' contract).

69. *Id.* These modifications included limited wage increases and provided more flexible working conditions for Mesa Verde. *Id.*

70. *Id.*

workers.[71] This would constitute a violation of the collective bargaining agreements, should they still be in effect. Both unions filed notices of grievance and requested arbitration concerning the contractual obligations for the Orland project.

Eventually, the district court granted Mesa Verde summary judgment against both unions.[72] The court held that these collective bargaining agreements were construction industry prehire agreements[73] under 29 U.S.C. § 158[74] (better known as section 8(f) of the NLRA).[75] These prehire agreements were effectively repudiated by the letters sent by Mesa Verde to each of the unions.[76]

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71. *Id.*

72. *Id.* at 1127; *see* Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 598 F. Supp. 1092, 1094 (N.D. Cal. 1984), *aff'd*, 895 F.2d 516 (9th Cir. 1989).

73. A prehire agreement is the first step taken between an employer and a union. It contemplates that further action will be taken to develop a full bargaining relationship. The employer's obligation to fulfill the agreement is contingent upon the union attaining majority status. Ruttmann Constr. Co., 191 N.L.R.B. 701, 702 (1971). Congress authorized these agreements between the employer and the union even though the union did not maintain a majority status. This authorization was given based on the "uniquely temporary, transitory, and sometimes seasonal nature of much of the employment in the construction industry." Jim McNeff, Inc. v. Todd, 461 U.S. 260, 266 (1983).

74. 29 U.S.C. § 158(f) (1988) provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Id.

75. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1127 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990).

76. *Id.* The district court also denied the Laborers' motion to vacate and did not grant the Laborers additional discovery to determine the existence of a core group of employees. *Id.*

Initially, the Ninth Circuit affirmed, in accordance with Supreme Court precedent.[77] On rehearing en banc, the Ninth Circuit was faced with a peculiar situation. First, the Ninth Circuit noted that in a recent case in the Third Circuit, *International Association of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB* ("*Deklewa*"),[78] the Board had changed its interpretative rule.[79] This new administrative rule was now contrary to the one upheld in two Supreme Court precedents: *NLRB v. Local Union No. 103* ("*Higdon*")[80] and *Jim McNeff, Inc. v. Todd*.[81] Both precedents were in accord with the Board's older rule that prehire agreements could be

77. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 832 F.2d 1164 (9th Cir. 1987). The two Supreme Court precedents are Jim McNeff, Inc. v. Todd, 461 U.S. 260, 271 (1983) ("A § 8(f) prehire agreement is subject to repudiation until the union establishes majority status.") and NLRB v. Local Union No. 103, 434 U.S. 335, 341 (1978) ("*Higdon*") (A prehire agreement is voidable unless and until the union actually represents a majority of the employees.). *See infra* notes 80-81.

78. 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988) [hereinafter *Deklewa*, so named for the company John Deklewa & Sons involved in the suit]. *Deklewa* was decided after the Ninth Circuit's panel decision and before the Ninth Circuit's en banc decision.

79. *Mesa Verde*, 861 F.2d at 1128.

80. 434 U.S. 335 (1978) ("*Higdon*," so called for the Higdon Construction Co. involved in the suit). Higdon Construction Co. and Local 103 of the International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Local 103) entered into a prehire agreement which obliged Higdon to abide by the terms of the multiemployer understanding between Local 103 and the Tri-State Iron Workers Employers Association, Inc. *Id.* at 339. At the same time, Higdon Contracting Co. was formed expressly to carry on work with nonunion labor. Local 103 never represented a majority of the employees, nor did it petition for a representation election to determine the preference of the employees. *Id.* Regardless, Local 103 picketed two projects undertaken by Higdon Contracting Co. Local 103 carried signs which read: "Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103." *Id.* Because of the picketing, Higdon filed a charge with the Regional Director of the Board, which alleged that Local 103's picketing constituted an unfair labor practice which was forbidden by section 8(b)(7) of the NLRA. *Id.*

Initially, the administrative law judge determined that Higdon Contracting Co. and Higdon Construction Co. were legally indistinct for purposes of the proceeding. *Id.* The judge also decided that there was no unfair labor practice because Higdon had entered into a lawful section 8(f) prehire contract with Local 103 in which it promised to abide by the multiemployer standard. *Id.* The purpose of the picketing was to obtain compliance with an existing contract, not for the forbidden purpose of obtaining recognition as the bargaining representative. *Id.*

On appeal, the issue in *Higdon* was whether unions could picket to enforce prehire agreements, even though the union had not obtained majority status. *Id.* at 341. The Supreme Court agreed with the Board and declared that under section 8(f) of the NLRA a prehire agreement was voidable unless and until a union attains majority status. *Id.*

After determining that the agreement was voidable, the Supreme Court held that there could be no picketing. *Id.* at 341-52. The Court reasoned that under section 8(f), a prehire agreement does not entitle a minority union to be treated as the majority representative of the employees until and unless it attains majority support in the relevant unit. *Id.* at 346-52. Until then, the prehire agreement is voidable and does not have the same stature as a

repudiated unilaterally. The Board's new interpretative rule declared

collective bargaining contract entered into with a union which actually represents a majority of the employees and recognized as such by the employer. *Id.*

The Court also noted that picketing by a minority union to enforce a prehire agreement that the employer refuses to honor gives the union the practical effect of attaining recognition as the bargaining representative with majority support among the employees. *Id.* Acting as the bargaining representative without having majority support is a violation of section 8(b)(7)(C) of the NLRA. *Id.* at 341. This is consistent with the statutory policy that a union should not purport to act as the collective-bargaining agent for all unit employees, nor should it be recognized as the bargaining agent, unless it is indeed the voice of the majority of the employees in the unit. *Id.*

29 U.S.C. § 158(b)(7)(C), which describes labor practices regarding picketing, provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (7) to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
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> . . . .
>
> (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof . . . .

29 U.S.C. § 158(b)(7)(C) (1988).

81. 461 U.S. 260 (1983). The Supreme Court again expanded the obligations arising under prehire agreements in *McNeff*. In *McNeff*, the petitioner was a subcontractor. *Id.* at 262. The general contractor entered into a master agreement with the union. *Id.* This contract provided that work on the jobsite would be performed only by subcontractors who had signed a labor agreement with the union. *Id.* When the petitioner began work at the jobsite, he had not signed the labor agreement with the union, nor did he employ any union workers. *Id.* at 263.

When the petitioner was informed that in order to remain on the jobsite he would have to sign the master agreement, he initially refused but later agreed to sign it. *Id.* The master agreement required the petitioner to make monthly contributions to a trust fund. *Id.* For six months, the petitioner submitted the required reports but made no contributions. *Id.* at 263-64. After the petitioner delayed the respondents' audits as long as he could, the respondents finally determined that petitioner owed in excess of five thousand dollars to the trust fund. *Id.* at 264.

The issue in *McNeff* was whether monetary obligations that accrued under a prehire agreement could be enforced, prior to the repudiation of the agreement, when there was no proof that the union represented a majority of the employees. *Id.* at 262.

The Supreme Court held that a prehire agreement is subject to repudiation until the union establishes majority status. *Id.* at 271. Even though majority status was not attained, the monetary obligations assumed by an employer under a prehire contract could be recovered by a union prior to the repudiation of the contract. *Id.* at 271-72.

In its analysis, the Supreme Court noted that Congress determined that prehire contracts should be lawful in order to meet the problems which are unique to the construction

that prehire agreements were not voidable simply because the union had not obtained majority status. The question now before the Ninth Circuit was whether it could choose to implement the new agency rule despite Supreme Court precedent.

At first glance, it appeared as though the Ninth Circuit could not adopt the Board's new rule because it would be contrary to Supreme Court precedent.[82] After analyzing both *Higdon* and *McNeff*, however, the Ninth Circuit declared that "[i]n neither case . . . did the Supreme Court definitively construe [section] 8(f). Rather, the Court found that the Board's interpretation of [section] 8(f) was an acceptable interpretation of the statute and that it reasonably implemented the purposes of the Act. The Court, therefore, deferred to the NLRB's interpretation of [section] 8(f)."[83]

The Ninth Circuit then proceeded to point out specific language in both *Higdon* and *McNeff* to support its holding that the Supreme Court only deferred to the NLRB.[84] The Ninth Circuit first pointed to the part of the *Higdon* opinion which stated that "the function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."[85] The court noted that the *Higdon* Court "concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections."[86] The *Mesa Verde* court then decided that the *Higdon* Court did not "independently construe the reach and scope of section 8(f). Rather, the [*Higdon*] Court recognized the expertise and experience of the Board in effectuating national labor policy as mandated by Congress and limited its review to whether the Board's interpretation of [section] 8(f) was reasonable."[87]

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industry. *Id.* at 271. Even though a prehire agreement has a limited binding effect, logic and equity support that a party to such an agreement can reap benefits only by paying the bargained-for consideration. *Id.* Legislative history indicates that Congress did not intend for employers to obtain the benefits of stable labor costs and labor peace without providing some consideration. *See id.*

82. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1129 (9th Cir. 1988) (en banc), *cert. denied*, 111 S. Ct. 209 (1990); *see supra* notes 80-81.

83. *Mesa Verde*, 861 F.2d at 1129.

84. *Id.*

85. *Id.* (quoting *Higdon*, 434 U.S. 335, 350 (1978) (quoting NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957))).

86. *Id.* at 1129 (quoting *Higdon*, 434 U.S. at 341).

87. *Id.* at 1129.

The *Mesa Verde* court then shifted its analysis to *McNeff*. The Ninth Circuit held, just as in *Higdon*, that the *McNeff* Court did not provide an independent construction of section 8(f).[88] Rather, the *McNeff* Court relied on the *Higdon* Court's affirmance of the Board's interpretation of section 8(f).[89] The Ninth Circuit pointed to specific language in the *McNeff* opinion where that Court noted that in *Higdon* it was approving the Board's interpretative rule.[90] The *Mesa Verde* court then pointed to language in both *Higdon* and *McNeff* which expressly recognized that an administrative agency is allowed to change its interpretative rules.[91] Thus, the Ninth Circuit held that neither *Higdon* nor *McNeff* precluded it from adopting the Board's new interpretative rule as expressed in *Deklewa*.[92] The Ninth Circuit concluded that in both *Higdon* and *McNeff*, "the Supreme Court looked to the Board's interpretation, found it reasonable and consistent with the NLRA, and deferred to the Board's interpretation."[93]

Thus, the Ninth Circuit decided that it also could defer to the Board, if the agency's interpretation met the standard established by the Supreme Court. The next issue, then, was whether the new interpretation offered by the Board was a reasonable and tenable construction of section 8(f).[94] To determine the answer, the *Mesa Verde* court first examined the legislative history. The court noted that when Congress passed section 8(f), it recognized the unique relationship among the parties in the construction industry and the widespread use of these prehire agreements.[95]

Congress recognized the special needs of the building and construction industry that arise due to the "occasional nature" of the employment.[96] This makes the construction industry different from other industries, such as manufacturing.[97] A construction worker will typi-

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88. *Id.*

89. *Id.* (citing Jim McNeff, Inc. v. Todd, 461 U.S. 260, 266-67 (1983)).

90. *Id.* at 1129-31 (citing *McNeff*, 461 U.S. at 269).

91. *Id.* at 1130 (citing *Higdon*, 434 U.S. 335, 351 (1978)).

92. *Id.* at 1130. *See generally International Association of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988) ("*Deklewa*"); *supra* note 78 and accompanying text.

93. *Id.*

94. *Id.* at 1130-31.

95. *Id.* at 1131. For legislative history, see generally S. REP. NO. 187, 86th Cong., 1st Sess. 27-29, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2344-45, *and in* 1 NLRB, LEGISLATIVE HISTORY OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 423-25 (1959).

96. *Mesa Verde*, 861 F.2d at 1131.

97. *Id.*

cally work for several employers.[98] Frequently, jobs are of short duration, depending upon the particular stage of the construction.[99] An employer must know his labor cost before submitting his bid. An employer must also have an available supply of skilled craftsmen for quick referral.[100] Enactment of section 8(f) recognized the industry-wide use of these prehire agreements which are designed to meet these needs.[101]

The *Mesa Verde* court reasoned that allowing unilateral repudiation of these collective bargaining agreements did not advance the congressional intent.[102] To allow parties to make prehire agreements, but to allow them to be unilaterally repudiated would be an "exercise in futility."[103] The Ninth Circuit concluded, therefore, that the legislative intent more strongly supported the *Deklewa* nonrepudiation rule.[104]

The *Mesa Verde* court then examined the two most important interests at issue controlling whether prehire agreements should be voidable at will.[105] First, the NLRA[106] provides employees with freedom of choice and majority rule in their selection of representatives.[107] Second, the structure of the collective bargaining process and various provisions of the Act, like the "contract bar,"[108] guarantee labor relations stability to both employers and employees.[109] The *Mesa Verde* court held that the old voidability rule provided more support for employee free choice because limited section 9(a)[110] status was not given

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* (quoting Local Union No. 150 v. NLRB, 480 F.2d 1186, 1190 (D.C. Cir. 1973)).
104. *Id.* at 1131.
105. *Id.*
106. 29 U.S.C. §§ 157, 159 (1988) (National Labor Relations Act §§ 7, 9).
107. *Mesa Verde*, 861 F.2d at 1131-32.
108. "The 'contract bar' provides that once a certification election is held within an appropriate bargaining unit, no other election may be held for twelve months." *Id.* at 1132 n.6. The contract bar does not apply to section 8(f) agreements. *Id.* at 1132.
109. *Id.* at 1131-32.
110. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a), provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the

to a union that had not demonstrated majority support.[111] On the other hand, the Board's new rule announced in *Deklewa* better served the interest in labor relations stability.[112]

Appellee and amici argued that by retaining the power to unilaterally repudiate prehire agreements, employers were able to protect their employees' "free choice" rights.[113] The *Mesa Verde* court was not convinced. It stated that the employer's decision to repudiate a prehire agreement is more likely to be based on the employer's economic considerations, rather than the employee's choice of maintaining the status quo.[114] The *Mesa Verde* court concluded[115] that *Deklewa* should be adopted in the Ninth Circuit, and it remanded to the district court for a determination of whether *Deklewa* should be applied retroactively.[116]

Three separate dissenting opinions were written in the *Mesa Verde* cases. Judge Wallace noted that the question was "close" regarding the Supreme Court's conduct in *McNeff*, but in the end, he was persuaded that the Supreme Court conclusively interpreted section 8(f), rather than merely deciding that the NLRB's interpretation was permissible.[117] Thus, as a lower federal court, the Ninth Circuit

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bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1988).

111. *Mesa Verde*, 861 F.2d at 1132. Only limited section 9(a) status is conferred on unions which enter prehire agreements under section 8(f). *Id.* at 1132 n.7.

112. *Id.* at 1132.

113. *Id.*

114. *Id.* In addition, the court noted that the *Deklewa* rule eliminated the problems arising under the conversion doctrine. *Id.* at 1133. Under the conversion doctrine, a section 8(f) relationship may convert to section 9(a) status. The time of conversion may occur anytime after the signing of the prehire agreement. *Id.* Conversion requires a showing of majority support during a relevant period among an appropriate unit of employees. *Id.* at 1133-34. Because of the new rule, both parties will know their rights and obligations at all stages of the bargaining relationship. *Id.* Both parties will be required to comply with the agreement, absent a Board-conducted election to reject or change a bargaining representative. *Id.* at 1134.

115. The court also addressed the issue of the "rule" of Royal Dev. Co. v. NLRB, 703 F.2d 363, 369 (9th Cir. 1983). *Royal* held that a panel of the Ninth Circuit could not adopt a Board decision which conflicted with circuit precedent. *Mesa Verde*, 861 F.2d at 1134. The *Mesa Verde* court circumvented this potential problem by holding that if prior decisions of the Ninth Circuit constituted only deferential review of NLRB interpretations of labor law, and did not decide that a particular interpretation of a statute was the only reasonable interpretation, then subsequent panels of the Ninth Circuit are free to adopt new and reasonable NLRB decisions without the requirement of en banc review. *Id.* at 1134-35.

116. *Mesa Verde*, 861 F.2d at 1136-37.

117. *Id.* at 1137 (Wallace, J., dissenting).

was bound to follow the Supreme Court's interpretation.[118]

Judge Hug's dissent argued that the inquiry was one of pure statutory interpretation concerning how Congress intended prehire agreements to operate.[119] According to Judge Hug, the Supreme Court settled this question after examining the statutory language, the legislative history, and the NLRB's interpretative rule.[120] Consequently, the Supreme Court's interpretation "must stand until it is overruled by the Supreme Court or until Congress amends the statute."[121] Judge Hug insisted that the Supreme Court did interpret the statute in both *Higdon* and *McNeff*, even though the Supreme Court gave deference to the Board's interpretation.[122] "The [Supreme] Court did not . . . decide only that the Board's interpretation was a reasonable construction of the Act . . . . Instead—after giving heightened consideration to the Board's arguments—the [Supreme] Court passed judgment upon the meaning of section 8(f) and such judicial interpretation is binding under our principle of stare decisis."[123]

In the final dissent, Judge Kozinski interpreted the *Mesa Verde* court's majority opinion to mean that if a federal court relies on an agency interpretation of a statute, then the court's construction is binding only until the agency adopts a new interpretation.[124] "At that point the court, or a higher court, or a lower court, may—nay, must—follow the agency's new interpretation unless that interpretation is unreasonable."[125] This deference to an agency's interpretation significantly shifts power from the judiciary to the executive branch. Now, under the majority's new decision, judges do not decide what the law is, but only if the agency's interpretation of the law is reasonable.[126]

Judge Kozinski continued his dissent with a comparison of the roles of courts and agencies. He noted that courts and agencies are both institutionally and functionally different. Judicial decision making is founded on constitutional safeguards designed to protect it from the political manipulation which permeates the other two branches of government.[127] When courts interpret statutes, they are bound to "ap-

118. *Id.*
119. *Id.* at 1137-38 (Hug, J., dissenting).
120. *Id.* at 1138.
121. *Id.*
122. *Id.* at 1138-39.
123. *Id.* at 1138.
124. *Id.* at 1146 (Kozinski, J., dissenting).
125. *Id.*
126. *Id.*
127. *Id.*

ply the meaning endowed them by Congress and the President."[128] There is but one true meaning behind a statute, and the courts must find it.[129] Agencies, on the other hand, read policy content into statutes, or interpret them to foster a particular political viewpoint.[130]

Judge Kozinski continued, "[j]urisprudentially, I am troubled by the majority's implicit holding that the meaning of a statute can change in an instant simply because an administrative agency has said so."[131] "[S]tatutes have no fixed meaning, that in passing laws[,] Congress approves a range of . . . interpretations, each as good as the next."[132] This presents a practical problem with the majority's decision: many laws which have been interpreted conclusively by the court will become uncertain once the agency changes its interpretative rule. Because of these problems, the stability necessary for case law will not be found within the agency, but can only be found in the judiciary.[133]

III. ANALYSIS

A. *Stare Decisis*

Judge Kozinski's concerns are well-founded. The majority, however, seemed little troubled by the stare decisis concerns raised by the dissent. Under the doctrine of stare decisis, inferior courts must abide by or adhere to cases decided by superior courts within the same jurisdiction.[134] Assuming that the rule established by Supreme Court precedent was that prehire agreements could be unilaterally repudiated,[135] the *Mesa Verde* court did not follow binding precedent.

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128. *Id.*
129. *Id.*
130. *Id.* at 1146-47.
131. *Id.* at 1147.
132. *Id.*
133. *Id.* at 1146-47.
134. *See* Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967) ("The doctrine can be stated simply: there is an *absolute* duty to apply the law as last pronounced by superior judicial authority."); Pound, *supra* note 1, at 6 (Superior court decisions bind all inferior courts in that jurisdiction.); *see supra* notes 1-4 and accompanying text.
135. Many commentators have discussed various methods that should be considered when trying to determine exactly what the holding is and the inherent ambiguities involved with each method. *See e.g.*, Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 359 (1985) (criticizing the view of using material facts, because then one is forced to determine what the material facts are); Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72-73 (1928) (holding could be limited to what the court did on the facts); Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987) ("In order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between

Not only did the *Mesa Verde* court dismiss the stare decisis issue rather quickly, it did not even discuss stare decisis in the special case of statutory interpretation. Courts, including the Supreme Court,[136] and commentators agree that there is a strong presumption of correctness given to a judicial interpretation of a statute.[137] The Supreme Court, for instance, recently stated, "[c]onsiderations of *stare decisis* have *special force* in the area of statutory interpretation . . . ."[138]

Because this strong presumption is recognized by courts and commentators alike, only the most unusual circumstance should justify a departure from it. Traditionally, there are three exceptions which would warrant a deviation from statutory stare decisis. The first exception is based upon the possibility that the court's initial consideration of the issue was not thorough.[139] The second exception focuses on the idea that the statute is very general; thus, Congress must have left development of the statutory scheme to the courts.[140] The last exception proposes that when precedent has not generated extensive public and private reliance, it would not be harmful to deviate from the precedent.[141] The question therefore becomes, can *Mesa*

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the two events. In turn, we must extract this determination from some other organizing standard specifying which similarities are important and which we can safely ignore.").

136. For a recent Supreme Court decision discussing statutory stare decisis, see Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370 (1989).

137. Courts and commentators suggest four reasons for the doctrine. First, some suggest that a longstanding statutory interpretation becomes a part of the law and as such only Congress can change it. *See supra* notes 31-33 and accompanying text. A second reason is based upon legislative acquiescence. That is, if Congress does not overrule the precedent, and especially if it reenacts the statute without changing the language at issue, then courts presume that Congress approves of the judicial interpretation. *See supra* notes 34-37 and accompanying text. The third reason is based upon the presumption that parties have relied upon the decision and have conducted their affairs accordingly. *See supra* notes 38-39 and accompanying text. The final rationale rests upon a separation of powers argument. Congress is given the task of creating and amending the law, while the judiciary is confined to interpreting it. If the judiciary changes a rule which has been "amended" to the statute, then it is exercising a legislative function—for only Congress can amend or repeal a statute. *See supra* note 40 and accompanying text.

138. *Patterson*, 109 S. Ct. at 2370 (emphasis added). The exact degree of deference to be given to statutory precedents is a subject of some debate. One commentator advocates an absolute rule—that only Congress may change a judicial statutory interpretation. Marshall, *supra* note 7, at 183. Another commentator, however, has suggested abandoning the super-strong presumption of correctness in favor of an "evolutive" approach. Eskridge, *supra* note 4, at 1363.

139. *See* Eskridge, *supra* note 4, at 1369-84; *see also* Monroe v. Pape, 365 U.S. 167, 220-21 (1961) (Frankfurter, J., dissenting in part and concurring in part) (suggesting a significant exception to the strong presumption of correctness when the statutory precedent is procedurally flawed due to, for example, poor briefing or inadequate deliberation).

140. *See* Eskridge, *supra* note 4, at 1369-84.

141. *Id.*

Verde be explained by one of these exceptions?

1. Thoroughness of the Supreme Court's Investigation of Congressional Intent in Precedent

First, the two precedents, *NLRB v. Local Union No. 103* ("*Higdon*")[142] and *Jim McNeff, Inc. v. Todd*,[143] must be examined to determine how thoroughly the Supreme Court investigated the issue of Congress' intent to allow unilateral repudiation of prehire agreements. In *Higdon*, the Court stated that "[t]he Board and the Court of Appeals . . . differ principally on the legal questions of how § 8(f) is to be construed and of what consequences the execution of a prehire agreement has on the enforcement of other sections of the Act . . . ."[144] The Supreme Court concluded that the "Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections."[145]

The Board's view was that picketing to enforce a prehire agreement had the impermissible effect of requiring recognition of the labor union as the employees' bargaining representative, when in fact the union did not represent a majority of the employees.[146] The Court commented that "[t]he Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective-bargaining agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in the unit."[147] The Court acknowledged that in the past, it had held that "both [the] union and [the] employer commit unfair practices when they sign a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests."[148] However, the Court explained, "[s]ection 8(f) is an exception to this rule."[149] When the employer is in the construction industry, section 8(f) legitimizes the execution of a prehire agreement with a minority union, an act which is normally an unfair practice by both employer and union.[150]

142. 434 U.S. 335 (1978); *see supra* note 80.
143. 461 U.S. 260 (1983); *see supra* note 81.
144. *Higdon*, 434 U.S. at 341.
145. *Id.*
146. *Id.* at 341-44.
147. *Id.* at 344.
148. *Id.*
149. *Id.* at 345.
150. *Id.*

The *Higdon* Court next examined the legislative history of section 8(f). The Court determined that the motivating factor behind section 8(f) was an awareness of the unique situation in the construction industry.[151] Congress determined that two particular reasons justified the use of prehire agreements with unions that did not represent a majority of the employees.[152] The first reason was that it was "necessary for the employer to know his labor costs before making the estimate upon which his bid [would] be based."[153] The second reason was that "the employer must be able to have available a supply of skilled craftsmen ready for quick referral."[154]

Next, the Court noted:

> The Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." Of course, "recognition of the appropriate sphere of the administrative power . . . obviously cannot exclude all judicial review of the Board's actions." But we cannot say that the Board has here "[moved] into a new area of regulation which Congress [has] not committed to it."[155]

The union then tried to persuade the Court that the Board's statutory interpretation deserved little or no deference because the Board had been inconsistent in its application.[156] The Court quickly dismissed the argument by simply distinguishing the cases relied upon by the union.[157] Nevertheless, even if the union were correct and the

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151. *Id.* at 348.

152. *Id.*

153. *Id.* (quoting H.R. REP. NO. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2424, 2442, *and in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 759, 777 (1959)).

154. *Id.* (quoting H.R. REP. NO. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2424, 2442, *and in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 759, 777 (1959)).

155. *Id.* at 350 (quoting NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 499 (1960)).

156. *Higdon*, 434 U.S. at 350.

157. *Id.* at 350-51. The Union suggested that R.J. Smith Constr. Co., 191 N.L.R.B. 693 (1971), was inconsistent with Oilfield Maintenance Co., 142 N.L.R.B. 1384 (1963). The Court noted that the *Oilfield Maintenance* decision did not make it clear whether the

Board had been inconsistent in its application, that may not have mattered to the Court. The Court stated: "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes."[158]

Next, the union argued that "the Board's position permitting an employer to repudiate a prehire agreement until the union attains majority support renders the contract for all practical purposes unenforceable . . . ."[159] Similarly, the Court quickly dismissed this argument by distinguishing the case relied upon by the union to support the enforceability of prehire agreements.[160] It did not even address the fact that these agreements may actually be rendered unenforceable due to unilateral repudiation.

Justice Stewart wrote the dissenting opinion, and was joined in his dissent by Justices Blackmun and Stevens. The dissent did not think that any section of the Act "rendered illegal the union's peaceful primary picket protesting Higdon's unilateral and total breach of its prehire agreement . . . ."[161] In reaching this conclusion, the dissent argued:

> When an employer in the construction industry does choose to enter a § 8(f) prehire agreement, there is nothing in the provisions or policies of national labor law that allows the employer, or the Board, to dismiss the agreement as a nullity. Yet in this case the Court holds that both the Board and the employer may do precisely that.[162]

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union involved in that case had ever attained majority status. *Higdon*, 434 U.S. at 350-51. In addition, the Court noted that the *Oilfield Maintenance* case was distinguished by the Board in Ruttmann Constr. Co., 191 N.L.R.B. 701, 701 n.5, "as being 'primarily concerned' with 'the right of a successor-employer to disavow contracts made by a predecessor with five different unions and [its ability to] substitute the terms of a contract it had with another union.' " *Higdon*, 434 U.S. at 351 (quoting *Ruttmann*, 191 N.L.R.B. at 701 n.5).

158. *Higdon*, 434 U.S. at 351.

159. *Id.*

160. *Id.* The Union argued that the Board's position was contrary to the Supreme Court's decision in Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (1962). *Higdon*, 434 U.S. at 351. The *Higdon* Court described the *Retail Clerks* opinion as recognizing that section 301 of the Labor Management Relations Act conferred jurisdiction on federal courts to consider suits on contracts between an employer and a minority union, as well as those with majority-designated collective-bargaining agents. *Id.* at 351. This category also included section 8(f) contracts. Therefore, the *Higdon* Court limited *Retail Clerks* to a decision on a jurisdictional issue. Simply because a court has jurisdiction to entertain a suit on a particular contract does not render the contract enforceable. *Id.* at 351-52.

161. *Id.* at 355 (Stewart, J., dissenting).

162. *Id.* at 353.

The next case in which the Court had an opportunity to examine the issue of the legislative intent behind prehire agreements was *Jim McNeff, Inc. v. Todd*.[163] After discussing and analyzing the reasons behind Congress' enactment of the statute, the Court reassessed its *Higdon* opinion.[164] The Court stated:

> We first addressed the enforceability of a § 8(f) prehire agreement in *Higdon*. . . . In *Higdon*, we affirmed the Board's view that a prehire agreement does not make a union the "representative of [an employer's] employees" . . . .
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> . . . .
>
> In upholding the Board's view that a union commits an unfair labor practice by picketing to enforce a prehire agreement before it has attained majority status, we noted in *Higdon* that this view protects [the] interests that Congress intended to uphold when it enacted § 8(f). . . .
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> . . . [O]ur decision in *Higdon* promotes Congress' "intention . . . that prehire agreements were to be arrived at voluntarily . . . ." In accord with this intention, we approved the Board's conclusion that a "prehire agreement is voidable" "until and unless [the union] attains majority support in the relevant unit. . . ."
>
> The concerns with the § 7 rights of employees to select their own bargaining representative and our fidelity to Congress' intent that prehire agreements be voluntary—and voidable—that led to our decision in *Higdon* are not present in [*McNeff*]. . . .[165]

The *McNeff* Court also spoke of a party's "undoubted right to repudiate a prehire agreement."[166] Thus, from this reading of the *McNeff* opinion, one is led to believe that the Court considers itself to have done an independent analysis of the issue in *Higdon* and agreed with the Board only as an afterthought.[167] It seems as though the

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163. 461 U.S. 260 (1983); *see supra* note 81.

164. *McNeff*, 461 U.S. at 265-67.

165. *Id.* at 266-69 (citations omitted). *McNeff* differed from *Higdon* because *McNeff* involved the monetary obligations incurred by an employer after he signed a section 8(f) contract, while *Higdon* involved picketing to enforce the contract. These monetary obligations do not "impair the right of the employees to select their own bargaining agent. Unlike the situation in *Higdon*, enforcement of accrued obligations in a § 301 suit does not mean that the union represents a majority of the employer's employees." *McNeff*, 461 U.S. at 269.

166. *Id.* at 270.

167. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1137 (9th Cir. 1988) (en banc) (Wallace, J., dissenting) ("I am persuaded that the Supreme Court conclusively and authoritatively interpreted section 8(f), rather than merely deciding that the NLRB's interpretation was permissible."), *cert. denied*, 111 S. Ct. 209 (1990); *id.* at 1138 (Hug, J., dissenting) ("I part company from the majority because I believe the Supreme Court *did* definitively construe section 8(f) in both *Higdon* and

Court has not only thoroughly researched and analyzed the issue once, but rather, twice.[168]

In light of this analysis of the *Higdon* and *McNeff* decisions, any reliance upon an exception to a rule of statutory stare decisis rooted in the inadequacy of precedent seems unsustainable. The *Mesa Verde* court's decision cannot be justified on the ground that the Supreme Court failed to thoroughly consider the issue of the voidability of a prehire agreement. Consequently, the next exception to statutory stare decisis must be reviewed to determine whether the *Mesa Verde* decision falls within its purview. Therefore, an examination of the degree to which Congress left the development of the statute to the courts is required.

2. Degree to Which Congress Left Development of the Statutory Scheme to the Judiciary

Some justices have argued that the statutory presumption of correctness should be relaxed when dealing with broad congressional statutes, akin to general statements of policy, where Congress has left to the courts the job of filling in the details of the statute.[169] This gradual statutory development would occur in a common law style. Justice Stevens once wrote that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation."[170] Justice Stevens later qualified this statement: "[l]ike most, this proposition of law is not wholly without exceptions. Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common-law tradition."[171]

The rationale for this exception is straightforward. When Congress has declared a broad, sweeping policy, the courts are assigned

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McNeff, although the Court may have given deference to the Board's interpretation in doing so.").

168. In general, when a case involves an administrative agency, a court may articulate its opinion as deference to the agency, when in fact it just simply agrees with the agency. 2 K. DAVIS, *supra* note 9, § 7:13, at 61. The court may also state that the interpretative rule is controlling, that it has great weight, or that it must be given effect unless it is unreasonable or inconsistent with the statute. *Id.* at 60-61. Should the court disagree with the agency, it will simply dismiss the interpretative rule by declaring that it is entitled to no weight. *Id.* Consequently, the judicial verbiage in deciding the proper weight to afford an interpretative rule "is not necessarily to be taken literally." *Id.* at 61. This is because the verbalisms are "usually overstated" in the direction with which the court agrees. *Id.* at 64.

169. Eskridge, *supra* note 4, at 1377-81.

170. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 (1983) (Stevens, J., dissenting).

171. *Id.* at 641 n.12.

the task of shaping the boundaries of that policy on a case-by-case basis. Thus, when the courts conduct this common law process, they overrule prior decisions which are inconsistent with the general congressional policy, or they overrule unworkable rules.[172] This overruling is done in the same manner as the overruling of any common law precedent.

When this exception is applied to *Mesa Verde*, the question becomes what is the extent that Congress has left the job of developing the NLRA to the courts. While the text of the NLRA and its legislative history are both extensive,[173] not every possible situation was provided for under the Act.[174] Consequently, some aspects of the statute were left to the courts to interpret, with the aid of the agency's interpretative rules.[175] Since Congress did leave some decisions to the courts, a judicial precedent should be overruled only when the precedent is inconsistent with congressional intent or provides an unworkable rule.

The *Higdon* Court thoroughly analyzed the congressional intent and held that prehire agreements are susceptible to unilateral repudiation.[176] In addition, in *McNeff*, the Court had a further opportunity to examine the issue of the voidability of prehire agreements. In that case, the *McNeff* Court went to great lengths to prove that the legislative intent called for the voidability of prehire agreements.[177] In analyzing the legislative history, the Court looked to the statute, prior case law, House reports and Senate reports.[178] Nowhere in its *McNeff* opinion did the Court even suggest that the *Higdon* Court might have inaccurately read the NLRA's legislative history as it applied to prehire agreements.

Since the legislative history was accurately applied, *Higdon* should be overruled only if the rule it adopts is unworkable. Obviously, if the rule were unworkable, its deficiencies would have become apparent during the five years between the *Higdon* and *McNeff* decisions. In fact, in *Higdon*, the union argued that the Court's rule was unworkable because the voidability of section 8(f) agreements made

172. Eskridge, *supra* note 4, at 1377-81.

173. For language of selected sections of the Act, see *supra* notes 42, 44, 74 & 80.

174. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 129 (1944); *see supra* notes 45-51 and accompanying text.

175. For more information on the relationship between the courts and agencies, see *supra* notes 9-20, 41-61 and accompanying text.

176. NLRB v. Local Union No. 103, 434 U.S. 335, 346-49 (1978).

177. Jim McNeff, Inc. v. Todd, 461 U.S. 260, 265-71 (1983).

178. *Id.*

them virtually unenforceable.[179] The Court, however, seemed unconcerned with, or at least unpersuaded by, this argument and quickly disposed of the issue.[180]

Thus, *McNeff* again thoroughly analyzed the reasoning behind *Higdon* and did not find that the legislative history was applied incorrectly or that the rule was unworkable. Recent conclusions by the Ninth Circuit that the legislative history was applied incorrectly and that the rule is unworkable, coming after the Board's change of position, seem more rooted in a need to justify a dramatic departure from Supreme Court precedent than in an unbiased appraisal of the voidability of prehire agreements. Hence, the second exception to the strong presumption of correctness does not apply to the situation in *Mesa Verde*.

3. Extent of Public and Private Reliance

The third exception to the rule of statutory stare decisis occurs when there has been little reliance on the Court's interpretation.[181] Courts presume that Congress relies on the judicial decision unless Congress amends or repeals the statute.[182]

Not only is Congress presumed to have relied upon the judicial decision, but private parties are also presumed to have relied upon it.[183] After the Supreme Court ruled twice that prehire agreements were voidable unless and until the union attained majority support, both labor and management presumably relied upon this fact.[184] Most

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179. *See supra* notes 159-60 and accompanying text.

180. *Higdon*, 434 U.S. at 351. The union argued that the Board's position allowing an employer to unilaterally repudiate a prehire agreement until the Union attained majority status rendered the contract unenforceable, which was contrary to the Court's prior decision in Retail Clerks Int'l Ass'n v. Lions Dry Goods, Inc., 369 U.S. 17 (1962). The Court did not address the workability of prehire agreements because it limited the *Retail Clerks* decision to one of jurisdiction. *Higdon*, 434 U.S. at 351-52; *see supra* note 159.

181. Examples of the Court's willingness to overrule a statutory precedent due to slight private reliance and subsequent contrary legislation include: Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279-88 (1988); Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 504-05 (1984); Califano v. Sanders, 430 U.S. 99, 104-07 (1977); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 497-98 (1973).

182. Eskridge, *supra* note 4, at 1382 ("Where Congress itself has relied on a precedent, the precedent may be entitled to a super-strong presumption of correctness."); *see supra* note 39 and accompanying text.

183. Eskridge, *supra* note 4, at 1382 ("Where private parties have over time shaped their relations around a precedent's rule, it is considered presumptively unfair to change the precedent . . . , and courts will not do so without strong reason."); *see supra* note 38 and accompanying text.

184. United Bhd. of Carpenters & Joiners Local Union 953 v. Mar-len of La., Inc.,

employers and unions know their rights in this legal arena.

Prehire agreements were authorized by Congress because of the unique needs of the construction industry.[185] The fact that the use of prehire agreements was codified suggests that their use is widespread. If this is true, then it would be logical that parties who knew they could legally enter an agreement would also know of their equally important ability to legally repudiate them, at least until the union attained majority status.

Thus far, there is no compelling reason to warrant a deviation from the strong presumption of correctness afforded statutory precedents. None of the traditional exceptions to statutory stare decisis are applicable. The only other justification for the *Mesa Verde* decision would be if the need to defer to the NLRB outweighed the considerations of precedent. There are several different circumstances under which *Mesa Verde's* deference to the NLRB would be warranted. These circumstances are discussed below.

B. *Agency Deference*

There are several different circumstances under which courts will defer to an agency, thus implementing the agency's interpretative rule. Courts may give the interpretative rule authoritative effect if the rule were outstanding when the statute was reenacted[186] or if the rule were made contemporaneously with the statute.[187] Likewise, courts look to such factors as when the interpretative rule was actually created and the consistency of the agency's position.[188]

When applying these factors to this case, one can see that the

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906 F.2d 200, 203 (5th Cir. 1990) (The contractor "entered into its pre-hire agreements with the unions relying on its then-existing right to repudiate unilaterally the agreements so long as the unions had not achieved majority status.").

185. *See supra* note 73.

186. 2 K. DAVIS, *supra* note 9, § 7:13, at 59.

187. *Id.*; *see* Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 n.5 (1978) (contemporaneous construction of a statute warrants "considerable weight"); *Adamo Wrecking*, 434 U.S. at 302 (Stevens, J., dissenting) (contemporaneous construction of a statute receives "peculiar weight" (citing Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933))); Center For Auto Safety v. Ruckelshaus, 747 F.2d 1, 5 (D.C. Cir. 1984) (An administrative interpretation that is made contemporaneously with the statute receives high deference because it "presumably . . . is unlikely to have been either informed or coerced by the enacting legislature's genuine intent.").

188. National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 167 n.31 (D.C. Cir. 1982) ("Both consistency and contemporaneous construction increase the amount of deference to be given to an agency's interpretation."); *see* Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) ("This longstanding and consistent administrative interpretation is entitled to considerable weight."); *see also* General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)

creation of the Board's new interpretative rule occurred fairly recently and not at the time of the enactment of the statute. The rule was actually announced in 1987 by the *Deklewa*[189] court. Not only is the interpretive rule of recent origin, but it is absolutely contradictory to the previous NLRB interpretation of the statute.

Although agencies are not disqualified from changing their interpretation, more weight is given to an agency's interpretative rule when that rule has remained constant over the years.[190] Here, the NLRB did not maintain a consistent interpretative rule. Yet, even after acknowledging these changes in the interpretative rule, the *Mesa Verde* court still deferred to the agency.

Granting this much deference to the Board implies that there is a dynamic congressional intent or even no congressional intent.[191] Implementing all the Board's interpretative rules simply because they are a reasonable interpretation of the statute implies that there is not just one true legislative intent, but rather a range of legislative intents which the Board is free to rely on at its discretion. One of the functions of the NLRB is to effectuate national labor policy; however, it is for Congress and not the Board to define and determine this policy.[192] "[W]here Congress has adopted a selective system for dealing with [labor] evils, the [Labor Relations] Board is confined to that system.

("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency.").

In addition to the consistency of the agency's position, courts also look to the extent of the agency's expertise. Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976)); Morton v. Ruiz, 415 U.S. 199, 231-37 (1974); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (timing, consistency and expertise are all factors to be considered when determining the deference to give an administrative interpretation); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.25 (1977) (The Court noted the need for deference in light of "the complexity and technical nature of the statutes and the subjects they regulate . . . and [the] EPA's unique experience and expertise . . . ." (quoting American Meat Inst. v. EPA, 526 F.2d 442, 450 n.16 (7th Cir. 1975))); National Resources Defense Council, Inc. v. EPA, 656 F.2d 768, 774 (D.C. Cir. 1981) ("Where the issue [of statutory construction] presented involves questions of scientific expertise . . . we defer to the Administrator's interpretation."). This factor is less important in this case because expertise alone, without some additional justification, would not justify deference.

189. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988) ("*Deklewa*").

190. *See supra* note 188.

191. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1147 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting), *cert. denied*, 111 S. Ct. 209 (1990).

192. NLRB v. Brown, 380 U.S. 278, 290-92 (1965); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965) ("[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management.").

[T]he Board cannot go farther and establish a broader, more pervasive regulatory scheme."[193] The Board cannot adopt a policy which will frustrate or defeat the congressional policy;[194] nor can it ignore other equally important congressional objectives.[195] Because the court must read a statute in the way that best reflects its meaning, courts are far slower than agencies to overrule their own previous decisions.[196] "By contrast, agencies can change their outlook as often and easily as a chameleon changes its color. A change of administration may prompt an executive department to alter its position on a particular piece of legislation overnight."[197] In addition, "appointment of a single commissioner may drastically change the agency's approach to its organic statute."[198]

Courts should be slow to overturn Board decisions, but they are not left to wholly accept them.[199] Courts are not obligated to stand aside and rubber-stamp Board decisions that are inconsistent with a statutory mandate or which defeat or frustrate the congressional statutory policy.[200] Courts would not be fulfilling judicial obligations if they did not fully review Board decisions.[201]

Thus, the *Mesa Verde* court is bound to do more than make a cursory determination of the reasonableness of the Board's interpretative rule. It should follow judicial precedent in appropriate situations. It should take into account the factors of timing, consistency, and adherence to the congressional policy underlying section 8(f) of the NLRA.

CONCLUSION

The *Mesa Verde* court set aside Supreme Court precedent too swiftly. The court virtually ignored stare decisis, and did not address the strong presumption of correctness typically granted to statutory

193. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 676 (1961) (citation omitted).

194. NLRB v. Appleton Elec. Co., 296 F.2d 202, 206 (7th Cir. 1961).

195. Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

196. Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1146 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting), *cert. denied*, 111 S. Ct. 209 (1990).

197. *Id.*

198. *Id.*

199. NLRB v. Brown, 380 U.S. 278, 291-92 (1965); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945).

200. *Mesa Verde*, 861 F.2d at 1146 (Kozinski, J., dissenting).

201. *Id.*

precedent. Because the strong presumption of correctness applies, it should be deviated from only in the most unusual of circumstances. After analyzing the exceptions which would warrant a departure from this presumption, the situation in *Mesa Verde* does not rise to the level of a justifiable deviation. Since there is no reason to depart from statutory precedent, the Supreme Court precedents in *Higdon* and *McNeff* should have been respected.

In addition to the lack of justification for a departure from the doctrine of stare decisis, there was no compelling reason to deviate from the Supreme Court precedents under the agency deference doctrine. The *Mesa Verde* court did not take into account several factors usually associated with the judicial review of agency interpretations, for example, timing and consistency. The *Mesa Verde* rule simply forces the judiciary to defer to the agency so long as the agency's interpretation of the statute is reasonable. Because there is no justifiable departure from Supreme Court precedent under either stare decisis or agency deference, the *Mesa Verde* court should have followed the *McNeff* and *Higdon* decisions.

Martha Allard